(1)

991301 FEB 2 - 2000

No. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

DAVID JAFFE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID JAFFE
1747 Karen Court
East Meadow, N.Y. 11554
(516) 292-8911
Petitioner, Pro Se

48PP

QUESTIONS PRESENTED

In Brady v. Maryland, 373 U.S. 83 (1963), this court stated the prosecution has an affirmative duty to disclose evidence favorable to the defendant. Where that evidence is material, the failure to disclose it violates due process, irrespective of the good or bad faith of the prosecution. Petitioner's 2255 shows an extremely strong showing that the government violated its obligation under Brady, by failing to produce certain documents that were located at the Postal Inspector's that severely undermine the government's prima facia case and contradicted a number of the theories that the government expressly argued to the jury, especially as it concerned the petitioner. Petitioner also argues that competent counsel could have used this material to cross-examine the Government's cooperating witnesses and the Postal Inspector. In United States v. Zagari, 111 F.3d 307, 320 (2d Cir. 1997), states "Brady cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation." The 2d Circuit denied Petitioner a Certificate of Appealability, primarily based on the government's assertion that they made all of the documents at the Postal Inspection Office available to the defendants (the government claimed to have an open file policy), as well as their opinion that the alleged undisclosed evidence was not material because it would have been cumulative.

In Zagari the 2d Circuit contradicts the U.S. Supreme Court's Brady decision. If given the probable view that the defendants would not know what the govt.'s internal investigation and document's would show, essentially, the 2d Circuit's decision allows the govt. to withhold or hide materials beneficial to the defense, if the govt., at anytime before or after trial, merely "says" the substantial

exculpatory evidence was available, blindly taking the side of the govt.'s word, without discussion or argument from the defense. Such a bias assumption exonerates the govt. from Brady's obligation to disclose. Considering in this case where the voluntary disclosure of certain exculpatory material, including 3500 material, would undeniably show the govt.'s prior knowledge and thus their perjury to the Grand Jury. Also, it would show the government's knowledge of cooperating codefendants' perjury at their respective plea hearings and trial testimony that erroneously supported some the allegations/lies made by the govt. to the Grand Jury and to the District Judge. Considering the voluminous exculpatory documents that support these assertions, there is a strong assumption that the documents were hidden to conceal the govt.'s criminal acts. The questions raised are:

1. Whether the 2d Circuit's U.S. v. Zagari decision contradicts the U.S. Supreme Court's Brady v. Maryland decision? The prosecutor's failure to disclose evidence favorable to the defense and in not doing so violated due process.

2. Whether the District Court Judge's comments during trial denied defendants right to a fair trial and interfered with the defendant's attorney/client relationship?

3. Whether Petitioner should be given a Certificate of Appealability because of appellate attorney's possible incorrect interpretation of the 2d Circuit's Billy-Eko decision, thus leading to the defendant's withdrawal of his direct appeal in order to expand the record? Defendant in this case has had no appeal or oral argument in the appellate court. In United States V. Billy Eko, 8 F.3d 111 (2d Cir. 1993), which requires an appellant to pursue a 2255 to show ineffective assistance of counsel when there are matters outside the trial record. Where appellant's central claim is

ineffective assistance of counsel which requires further factual development. Should appellant be allowed to argue their 2255 in full, in the district court or the appellate court, using material outside the record, without having to give up their right to an appeal in order get access to discovery and expand the record?

4. Whether Petitioner received his constitutional right to effective assistance of trial counsel under requirements the Strickland v. Washington? Petitioner's trial counsel admitted to the District Court, out of the presence of Petitioner, that he was unfamiliar with federal practice, did only limited discovery, failed to use fertile 3500 material and his "trial strategy" was severely altered because of statements made by the District Judge. Because of trial counsel's lack of due diligence, there was repetitive acts of prosecutorial misconduct which denied Mr. Jaffe his constitutional right to a fair trial, resulting in an unjust conviction, and produced substantial prejudice against the Petitioner and the adversary process.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: AUSA Leonard Lato, U.S. District Court Judge Joanna Seybert, U.S. Postal Inspector Louis LaFleur, United States of America, and Defendant David Jaffe (the petitioner herein). Named defendants were: Anthony Brucato, Louis Laino, Todd Davis, Charles Regensburg and Regina Quinan.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

The Procedural History..... 4

The Defense 9

The 2255 Petition 10

REASONS FOR GRANTING THE WRIT 17

I. The Writ Should Be Granted to Enforce The Notion That Due Process, Requiring That All Exculpatory Material Known To The Government, In Favor Of The Defense, Should Be Handed Over To The Defense, As Required By Brady. The Government Should Not Be Able To Hide Behind The 2d Circuit's Zagari Decision Essentially Blaming The Defense Counsel In Not Doing Due Diligence..... 17

II. This Court Should Grant This Writ To Reinforce The Notion That Comments And Opinions By The District Judge, Have Great Significance Which May Interfere With The Adversary Proceedings, Especially When Those Statements Reveal Prejudice And Bias

Before, During and After The Trial, This Violates The Defendant's Right To Due Process And The Right To Be Presumed Innocent 23

III. This Court Should Grant The Writ To Clarify The 2d Circuit's Billy-Eko Decision Which Requires An Appellant To Pursue A "2255" to Show Ineffective Assistance Of Counsel When There Are Matters Outside The Trial Record 27

IV. This Court Should Grant This Writ, As Well As A New Trial Or A Certificate of Appealability, To Reinforce The Notion That The Truth Matters And What Standards Determine The Legitimacy Of A Claim Of Ineffective Assistance Of Counsel, Under The Requirements Set In The Supreme Court's Strickland v. Washington Decision. There Is a Confusion With The 2d Circuit's United States v. Nersesian Decision Regarding What Is Considered Reasonable Trial 28

CONCLUSION 30

APPENDIX:

Order Denying Certificate of Appealability, Entered November 10, 1999 ..... App. 1

2d Circuit's Summary Order, Entered July 7, 1998 ..... App. 2-10

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U.S. 83 (1963) ..... i, 17, 21

Kyles v. Whitley, 115 S.Ct. 1555 (1995) 17, 19

Lockhart v. Fretwell, 506 U.S. 364 (1993)..... 25

Napue v. Illinois, 360 U.S. 264 (1959) 29

Strickland v. Washington, 466 U.S. 668 (1984) ... 28

United States v. Bagley, 473 U.S. 662 (1985) 18, 29

United States v. Billy-Eko, 8 F.3d 111
(2d Cir. 1993)..... ii,v,7, 27

United States v. Nersesian, 824 F.2d 1294
(2d Cir. 1987) 25

United States v. Payne, 63 F.3d at 1208
(2d Cir. 1995) 22

United States v. Vozella, 124 F.3d 389
(2d Cir. 1997) 21

United States v. Zagari, 111 F.3d 307
(2d Cir. 1997) i,18, 22

Statutes and Rules:

28 USC 1254(1) 1

F.R.C.P. 1 28

F.R.A.P. Rule 42(a) 7

In The

SUPREME COURT OF THE UNITED STATES

No.

DAVID JAFFE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

There was no decision of the Court of Appeals because Petitioner was never given an appeal. The Summary Order affirming the conviction in the District Court was not published.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

After a one-week jury trial in the Eastern District of New York, petitioner David Jaffe was convicted on one count of conspiracy to commit wire fraud (18 USC 371), six counts of substantive wire fraud (18 USC 1343), one count of conspiracy to launder monetary instruments (18 USC 1956(h)) and three counts of substantive money laundering (18 USC 1956(a)(1)(A)(i). In the first indictment, Jaffe, and five others were initially charged with alleged mail and wire fraud. After three alleged coconspirators plead guilty in the district court, the remaining three were charged, in a superseding indictment, one month before trial, with four additional counts of money laundering. Mr. Jaffe and two other codefendants went to trial.

This case involved two telemarketing companies BLD Finance ("BLD") and International Credit Services ("ICS"), the alleged "boiler room scam". Throughout the government's case their theories shifted repeatedly. There was little question at trial that certain individuals at these companies began to defraud some consumers by failing to deliver loans and debt consolidations, which an application fee had been paid, and then failing to refund the application fee. Along with a few victims who testified, BLD employees, Charles Regensburg, the President/100% shareholder of BLD, his girlfriend Regina Quinan, and his brother Michael Regensburg (the first two pled guilty, Michael Regensburg was not charged, but received immunity) testified for the government as to their "misdeeds". Todd Davis, the majority owner of both BLD/ICS and Allied, plead guilty but did not testify. According to these witnesses, the companies advertised in local magazines and newspapers; when a prospective customer called, a sales representative, using an alias, assured that, for a fee, the company would process the customer's application and would return the fee if the

customer did not receive what they had requested. The cooperators explained that, as the government elicited from the witnesses, in essence, all applicants were "approved" and supposedly none of the applicants ever got the "promised" loan and very few received a refund of the application fee. Instead of providing loans to customers, which according to the government the ads had promised, the government stated that BLD provided lists of prospective customers to a second company, Allied Financial Services, which was owned in part by the principal architects of the scheme, Todd Davis (who pled guilty but did not testify), as well as by defendant Jaffe. Significantly, though the govt. had investigated (and seized papers and records from) Allied, the government did not allege in the end that Allied did anything illegal and thus was not charged with any fraudulent conduct. The issue, as far as Mr. Jaffe was concerned, was whether he was a knowing, intentional participant in the fraudulent scheme. The indictment charged that he was a partner in and helped to manage the fraudulent. It should be noted that according to the govt.'s first presentation to the Grand Jury, on 11/15/95, (GX 3500-17) Jaffe's name is barely mentioned.

> Mr. Lato: Let's talk about this investigation and start with the principal targets, Todd Davis and Charles Regensburg. Give us a background how they started this operation.
>
> Mr. LaFleur: What BLD Finance was going to do is offer people loans over the telephone as I have just explained in which fees would be sent in and Mr. Davis and Mr. Regensburg would basically split whatever came in.

On 2/21/96, the AUSA Leonard Lato and US Postal Inspector Louis LaFleur give additional testimony to the Grand Jury, regarding the proposed indictment, to the Grand Jury (GX 3500-17). They now include Mr. Jaffe's name whenever they bring up Mr. Davis and Mr. Regensburg's

names, although the government neither presents nor has any evidence to make such a sweeping allegation.

On 4/30/96, at Ms. Quinan's plea proceeding (GX 3500-21), Mr. Lato himself had apparently not thought of Mr. Jaffe as a "manager" at the time he had had proffers from four different people. He stated at Ms. Quinan's plea proceeding, that it was "Todd Davis and Charles Regensburg who managed the companies."

On 11/16/96, the first day of the trial, now it's Mr. Jaffe as the one in command, in the AUSA Lato's opening statement he says: "The reigns of the company, the control, will be maintained by Mr. Davis and ultimately by Mr. Jaffe. On paper he may be nothing more than a bookkeeper, but in reality he is going to run the company." As to this, not one of the consumer/victims testified that he/she had dealt with Mr. Jaffe, except through his participation in Allied Financial, of which he was concededly a minority partner.

Mr. Jaffe's position was, and still is, that he was only marginally involved in BLD/ICS in that he provided some bookkeeping services for those companies, which, however, were fully Todd Davis' and later included Charles Regensburg's concerns. Mr. Jaffe's further position was that those companies were not the to "total scam" that the cooperators and the prosecutor made them out to be, that he knew that they in fact provided many loans, and that his principal business was at Allied, which in fact serviced many of the BLD "leads", not at BLD and ICS.

The Procedural History: As far as Mr. Jaffe is concerned, this case has a long, unusual and complicated history. The crux of Mr. Jaffe's appeal began when he was found guilty after a jury trial. Mr. Jaffe was sentenced to concurrent prison terms of 18 months, (which was completed), followed by 3 years' supervised release, and restitution of $325,000. Mr. Jaffe filed a timely appeal, which was joined with the appeal of his codefendants, Mr. Brucato and Mr. Laino.

Because Jaffe's central appellate claim was ineffective assistance of counsel, which required further factual development, he filed a motion pursuant to 28 USC 2255 to obtain a new trial (and a stay of sentence). The government urged that nothing should be done until the direct appeal was determined. It also convinced Judge Seybert to deny a stay of the short sentence, regardless of the merits of the effective assistance showing, because of the pendency of the direct appeal, despite our showing that the ineffective assistance claim went beyond the record and so would entail a useless duplication of resources to pursue the direct appeal first, and that, moreover, development by means of a 2255 was required pursuant to the 2d Circuit's this court's decision in United States v. Billy-Eko. The government refused to consent to withdraw the appeal without prejudice while the 2255 record was being developed. In order to be allowed to stay out of jail while these matters were being developed and not to have to fund two appellate briefs, the first of which would necessarily be incomplete in any event given the matters outside the record, Mr. Jaffe ended up having to withdraw his direct appeal.

While the petition was being litigated, the prosecutor finally agreed to permit counsel and Mr. Jaffe to review the government's files, the files that Mr. Jaffe's trial counsel had failed to look at prior to or during trail, and which Mr. Jaffe had urged would help prove the government's presentation had been skewed. (Mr. Jaffe's sentencing counsel, a different one from trial counsel and appellate counsel (who undertook Mr. Jaffe's post-conviction representation only after sentence) had asked Judge Seybert to allow a review of the seized documents prior to sentence; Judge Seybert twice refused.) As it turned out, when Mr. Jaffe finally did review the files at Postal inspector LaFleur's offices (while he was away on vacation), previously undisclosed exculpatory documents were discovered. With this discovery, Mr. Jaffe, by way of his reply declaration expanded his 2255 petition to

include a claim that the government violated its obligations under Brady v. Maryland, 373 US 83 (1963).

With Mr. Jaffe's discovery of the previously undisclosed documents, the codefendants' direct appeal and Mr. Jaffe's 2255 petition became enmeshed: first, the 2d Circuit granted the co-defendants motion to supplement the record to their direct appeal with the newly discovered material and the codefendants then included a Brady claim in their briefs to 2d Circuit similar to the one Mr. Jaffe had included in his 2255 petition; thereafter, upon motion of Mr. Jaffe (based on his concern that any determination by the 2d Circuit of the codefendants' Brady claim could affect the determination of his parallel Brady claim in the District court, the 2d Circuit granted Mr. Jaffe's application to intervene in the codefendants' direct appeal. (Order of 3/30/98) It should be noted that Brucato's attorney, different form his trial counsel, had made a similar request to Judge Seybert, prior to sentencing, for discovery and was also denied. In fact, Mr. Jaffe's co-defendants would not have been able to supplement their appeals with the newly discovered documents if Mr. Jaffe hadn't withdrawn his appeal to get access to them.

Just days before the 2d Circuit granted Mr. Jaffe's motion for intervention in 97-1171(L), however, Judge Seybert denied Mr. Jaffe's 2255 petition and despite finding the need to write a 47-page opinion disposing of the petition, also denied a certificate of appealability. Thereupon, on 3/31/98, Mr. Jaffe filed a notice of appeal from the denial of the petition, and moved in the 2d Circuit for both a certificate of appealability, to consolidate his appeal from the denial of the petition with the direct appeal of his codefendants and for bail pending appeal. On 4/15/98, the government filed a memorandum in opposition for a certificate of appealabilty and for release pending appeal, basicalfy reiterating Judge Seybert determinations. On 5/13/98, Mr. Jaffe sent a letter to the 2d Circuit regarding a stipulation signed by Mr. Lato on 6/11/97 stating the following:

> Pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, the parties agree that the within appeal should be dismissed, without costs to either party, it being understood that appellant intends to pursue a previously submitted "2255" petition raising the issue of ineffective assistance of counsel, and, if unsuccessful in the district court, to pursue an appeal on that ground.

On 5/13/98 the government sent a letter to the 2d Circuit denying any such stipulation. On 5/29/98, Mr. Jaffe filed a motion for an order permitting intervenor to file brief out of time, granted by the 2d Circuit on 6/5/98. On 6/8/98, Mr. Jaffe filed a motion for an order permitting intervenor to participate in oral argument, denied by the 2d Circuit on 6/12/98. On 6/9/98, Mr. Jaffe filed a motion for an order permitting intervenor to file an appendix (out of time), granted by the 2d Circuit on 6/12/98. On 6/15/98, the govt. filed a motion to strike brief and appendix of intervenor Jaffe, denied by the 2d Circuit on 6/18/98. On 6/15/98, Mr. Jaffe filed a motion for an order expediting consideration of motion in 98-2255 for certificate of appealability and to consolidate, denied by the 2d Circuit on 6/18/98.

On 7/7/98, the 2d Circuit denied Mr. Jaffe's codefendants' appeals and confirmed the judgment of the district court. By the 2d Circuit's summary decision and order, the court had essentially rejected appellate contentions of David Jaffe, and had purported to make findings against Mr. Jaffe as if it had been his appeal, without ever allowing him an appeal. Moreover, it had done so based on assertions that are not valid. On 7/13/98, Mr. Jaffe filed a motion with the 2d Circuit for an order vacating findings and conclusions as to intervenor Jaffe. On 7/15/98, Mr. Jaffe filed a petition for rehearing, or rehearing en banc. Mr. Jaffe had only limited "participation" in the appeal, and only under very unique circumstances, made necessary by the 2d Circuit's decision in United States v. Billy Eko, 8 F.3d 111 (2d Cir. 1993), which requires an appellant to pursue a 2255 to show

ineffective assistance of counsel when (as here) there are matters outside of the trial record. The 2d Circuit's summary order (App. Page 7), thus concludes that:

> "Jaffe's ineffective assistance claim rests on general assertions that his counsel failed (a) to use "available documents" to support his arguments to the jury, (b) to "make use of one bit of 3500 material" to impeach witnesses; and (c) to conduct discovery or find "other material to support his client's defense." But Jaffe does not identify particular documents or materials, or indicate how they could have been used at trial."

This basis of "rejecting" Mr. Jaffe's argument for a new trial based on ineffective assistance is unjustified, because in Mr. Jaffe's brief, a brief necessarily quickly prepared because Mr. Jaffe was never given a scheduling order to file any intervenor's brief, had been granted intervention well after the briefs of the parties had been filed, and was informed that oral argument had been set only after he moved for a COA and consolidation in his own case, Mr. Jaffe does incorporate the extensive discussion, and showing, of 3500 material and documents that his counsel failed to use, which were, and are, contained in his Intervenor's Appendix, which he specifically sought (and was granted) permission to file. Thus Jaffe wrote:

> We urge the Court to consider those papers in full, because they elucidate in full what we can only say in broad strokes in this limited brief.

Further, in the Intervenor's Appendix, Jaffe did attach numerous 3500 documents that counsel had been given, and did identify prior statements of witnesses that could have and should have been used to show the jury why the witnesses and the government were not telling the truth about Mr. Jaffe. Frankly, the Court's statement in this regard, at best, suggests that the Court did not have before it Mr. Jaffe's intervenor's brief or Appendix, and thus did not see his full arguments and showing.

On 8/13/99, the 2d Circuit granted Mr. Jaffe's motion (to vacate findings and conclusions as to intervenor Jaffe), 13 months after it was initially filed. On 9/24/99, the 2d Circuit denied Mr. Jaffe's petition for rehearing and a petition for a rehearing in banc, as being moot in light of vacating their decision against Mr. Jaffe.

On 11/10/99, the 2d Circuit (App. Page 1) denied Mr. Jaffe's motion for a Certificate of Appealabilty, some 19 ½ months after it was initially filed, and dismissed the appeal. The 2d Circuit's reasoning was "the appellant has not made a "substantial showing of the denial of a constitutional right." 28 USC 2253(c). This is the same reasoning Judge Seybert rendered in her denial of Mr. Jaffe's 2255 motion and Certificate of Appealability (Memo and Order, 97-CV-3007 (JS), 3/13/98).

The Defense: Jaffe's defense at trial, through his then counsel, Harry Hertzberg, a practitioner from the Bronx who confessed during pre-trial proceedings to having little experience with federal procedural matters such as speedy trial concerns and who failed to even inform his client to come to this pretrial conference, because he thought it was counsel only, was in essence limited to an attack on the credibility of the government's cooperating witnesses. This, however, was done in an utterly superficial way: counsel made no use of even one piece of 3500 material, did not rebut Regensburg's suggestion that Jaffe owned half of the 70% of the business that, according to Regensburg, Todd Davis and Jaffe shared, by pointing to documentary material in evidence that rebutted it, and used no ammunition in the confrontation; instead he asked almost embarrassingly juvenile questions such as, "Charlie Regensburg, you're a thief, a criminal and a liar, aren't you?", but did not back this up with any "meat" showing that Regensburg had made totally inconsistent statements to the government. Counsel called only one witness (Lisa Morales) who was not involved in either BLD or ICS. Ms. Morales was not originally going

to be a witness, she only became a witness, four days into the trial, because of the prejudicial remarks by the District Court Judge of "I will declare a mistrial if you (counsel) can show me prejudice" and "I guarantee you of a winning summation," remarks, pertaining to the AUSA's statements (discussed later). Ms. Morales had worked with Jaffe at Allied and was asked a very limited amount of questions designed to show that that company was legitimate: Allied used leads received from BLD to identify potential customers and did obtain loans for such customers (T. 1106-1145). Trial counsel, could have no reasonable explanation why he never used any of the government's prior statements either within the 3500 material or within the AUSA opening statement although it rebutted the central assertion regarding the government's main case theory as example in the AUSA Lato's opening statements to the jury, (T.116): "There will be no evidence that anybody ever got a loan directly from, or indirectly from BLD or International Credit."

Apparently finding insufficient reason to believe that Regensburg and the others were "a liar" when they gave testimony at trial lumping the name "Jaffe" with the name "Todd Davis" when answering every question about who ran the company or made particular decisions about refunds, ads, etc., and because the AUSA vouched for the cooperating witnesses truthfulness, the jury convicted Mr. Jaffe as well the co-defendants, both of whom were sales persons at BLD (unlike Jaffe, who was not). It should also be noted that both of co-defendants counsel admitted to doing no discovery at all, and also used none of the 3500 material and presented no witnesses on behalf of their clients.

The 2255 Petition: After Jaffe was sentenced (with the assistance of a second counsel, who was denied twice access to the government's files that trial counsel had failed to review), and after a Notice of Appeal had been filed, Mr. Jaffe sought collateral relief based, initially, solely on a claim of ineffective assistance of counsel, although at his

sentencing hearing he wrote a letter to the Court asserting several forms of prosecutorial misconduct. The heart of his complaint was that his attorney's preparation was woefully inadequate and, as a result, he was ill equipped (if ever competent) to mount anything other than a most superficial defense. Indeed, counsel's time sheet showed that he spent only five hours on discovery, and this only a month before trial. At trial, the lack or preparation was obvious and took its toll. Jaffe intervenor's Brief and Appendix details the prejudice of counsel's failures in a way that the page limitations here prevent, counsel was derelict, and prejudicially so, in a number of ways:

(1) First, counsel did not use 3500 material at all, though it provided a real basis for the jury to disbelieve the government's witnesses regarding both Mr. Jaffe's participation in the scheme, and refuted the government's broad brush theory that the total operation was a scam. For example, in Regina Quinan's proffer (3500-14), she never even mentioned Mr. Jaffe, which is incomprehensible if he had been "running the show". As was discussed in Jaffe's 2255 motion and his intervenor's brief and Appendix, other material showed shifting stories by the cooperators. And by the way of further example, and most significantly, given the government's premise pressed repeatedly to the Grand Jury throughout the trial and summations, though Charles Regensburg, the star cooperator, testified at trial that no BLD customers obtained loans and there was no lender, his own prior statements directly contradicted the trial testimony – but the jury never knew this! To better illustrate the influence the government had over the cooperator's testimony, the following quotes from Charles Regensburg, in chronological order, validate Mr. Jaffe's assertions:

- 4/23/96 – Proffer – GX 3500-13;

  "Generated leads for Allied. Primerica agent and credit repair". "Todd Davis said some people were getting loans." "Was not given Primerica guidelines"

- 5/21/96 – Transcript of Plea – GX 3500-2;
  "And I was telling people that they were going to be receiving, you know, loans and they were not getting any loans."
- 11/1/96 – Proffer – GX 3500-13;
  "Primerica was known to sales people as the lender. Criteria was had to own." "Allied people got leads first not Primerica." "First heard of Primerica in Dec. 93." "First find out about Primerica in Feb. 94."
- 11/13/96 – Trial Transcript – page 491;
  AUSA Lato: "Sir, did BLD have a lender?
  Charles Regensburg: "No"
  AUSA Lato: "Were there any lenders that one would use anywhere?"
  Charles Regensburg: "No, not that I know of."
  Trial Transcript - page 634;
  Charles Regensburg: "There was no lender, or any type of subsidiary, or anything along those lines."

As is shown whenever Charles Regensburg is testifying under oath about loans or lender, he lies. In fact all the cooperators, when under oath, either at their respective plea hearings or at trial, commit perjury, falsely abetting the government's no loans - no lender theory.

(2) Second, counsel also failed to use the government's own exhibits and other materials in its files to show that the theories regarding ownership and operation of the companies were false. For example, though the government allowed testimony to go uncorrected suggesting that Jaffe owned a fix percentage of BLD together with Todd Davis, GX 17, which was in evidence and only interpreted by the AUSA, showed that Jaffe's compensation (which was given to him by Todd Davis for his work at Allied and had nothing to do with BLD) was not any fixed percentage and was far less than the 35% of BLD that the government allowed the jury (and judge) to believe was the case (and even found its way to the Pre-sentence report, which was

corrected only after the conviction had been returned. The important fact that Jaffe total earnings was a much smaller sum, and not any fixed basis belied the government's position that Jaffe had some ownership interest in the companies. It is also important to note that Mr. Lato himself had apparently not thought of Mr. Jaffe as a "manager" at the time he had had proffers from four different people. He stated at Ms. Quinan's plea proceeding on April 30, 1996 (GX-3500-21) that it was "Todd Davis and Charles Regensburg who managed the companies". It totally contradicts the AUSA Lato's assertion in his summation:

> "There is evidence in this case that Mr. Jaffe and Mr. Laino exercised management control. What happens in organizations is managers should have a share of the profits, or people who run the company and have a larger stake in the outcome should benefit as well. Is that what the documents show in this case? It is precisely what they show."

As discovered later, Todd Davis' own handwritten notes. which the Postal Inspector had in his files, and mentioned in the government's Grand Jury testimony, which was discovered only after the original 2255 was filed, say Davis had a "50-50 split" not with Jaffe, but "with Regensburg". Also, GX-17, which the government wrongfully interpreted as a "profit sheet", shows Charles Regensburg received (from BLD) more than twice the dollar amount that David Jaffe received (for Allied). This would have been hugely instrumental, considering the government's theory as AUSA Lato said in his summation (T. 1300): "Who in this case, either witness or defendant was bigger than Jaffe? Nobody." Although Charles Regensberg's testimony that Jaffe placed the ads (T.470-472), the Postal Inspector's own notes reflected that Todd Davis, not Jaffe, had placed BLD's ads. The jury knew known of this either.

(3) Third, counsel's lack of preparation was also a crucial factor for Mr. Jaffe (as he explained in his Declaration included in his 2255) when at the end of the

trial, he decided not to testify on his own behalf because it was by then plain to him that his lawyer was unfamiliar with the documents that would have corroborated and substantiated Mr. Jaffe's anticipated testimony. Only the night before Mr. Jaffe was expecting to testify did trial counsel informed him that he was not going to put him on the stand. The next day, not only did trial counsel urge him not to testify but both attorneys for the co-defendants also urged him not to testify as well. Mr. Jaffe was not prepared to go it alone. The reasoning given to Mr. Jaffe by all three attorneys was the expectation of a mistrial being declared by Judge Seybert, because of the comments she had made the last time the trial was in session, out of the presence of the jury. The Judge under the premise that the government had been truthful and had not purposely delayed handing over documents that Mr. Jaffe had discovered more than a week before trial, Judge Seybert said (T. 948-949):

> "If it is obviously exculpatory, and I find that the government did this in bad faith, then I will dismiss these charges and declare a mistrial, if that's the case."
>
> "If there is substantial prejudice, and any one of these defendants has been denied a fair trial, that's it, and they walk out of here. The indictment is dismissed."

A discussion also took place regarding a potential witness, Ms. Morales, in which the government had interviewed prior to trial. (T. 956-958)

> AUSA Lato: To this day she told me nothing inculpatory or exculpatory, which is why she is not on the witness list and I have not told her.
>
> Mr. Hertzberg: It was not her statement when I spoke to her.
>
> The Court: Bring her in as your witness.
>
> Mr. Hertzberg: If in fact she told Mr. Lato that loans were granted and that if he misunderstood her or –
>
> The Court: You can bring it out. Put her on the stand.

Mr. Hertzberg: If that's the case can I renew my motion of bad faith on the part of the government for not disclosing it? This is exculpatory, your Honor.

The Court: Sir, I had a statement from Mr. Lato that the supposed witness, Ms. Morales, did not make these statements. If you want to bring in the witness and have her get up here on the stand and testify she made those statements to Mr. Lato, I can guarantee you, you will have a winner of a summation to that jury, won't you, that Mr. Lato lied about witnesses said, and he failed to disclose information to you. So bring in Morales.

Mr. Hertzberg: Can I inquire one thing? Was any conversation transcribed when you had Ms. Morales in your office in any way?

Mr. Lato; No, and being the defense case hasn't started yet and she is not a witness I would have called, there possibly couldn't be any prejudice in this case.

Mr. Hertzberg: That being the case I withdraw my application.

The Court: You are withdrawing your Brady application now?

Mr. Hertzberg: If your Honor tells me she finds no bad faith.

The Court: I am not telling you anything sir. You have the right to make your Brady application, sir.

Mr. Lato went on to say: One thing I forgot and I have Inspector LaFleur here. As part of our 3500 material, there are notes on an interview of a Lisa Morales, not from recently, but maybe a year ago, so I want to double check that.

Mr. Hertzberg: Your Honor, I withdraw the Brady application.

Plainly, Mr. Hertzberg illustrates he doesn't know what he is doing, there is also a strong inference that Mr. Hertzberg withdraws his Brady application because he doesn't know

what it entails or how to make one. The interview Mr. Lato refers to was not part of the 3500 material. The fact is the government had withdrawn the interview (dated 7/6/97), he is attesting to, from the 3500 material as evident by the government exhibit 3500-28 sticker attached to the document, found only after trial. The evidence brought at trial, and more so in Mr. Jaffe's 2255 papers show AUSA Lato has repetitively lied, and hid documents, to the Court, as well as, the jury from his opening statements to his closing statements.

(4) Counsel failed to take advantage of discovery – including voluminous documents seized from BLD and its successor company ICS (in business only a month), and Allied - and thus failed to discover the existence of witnesses who could have provided important exculpatory evidence. While it is not certain if some of these documents would have been made available to counsel at the time, as discussed in Jaffe's reply 2255, there were notes of interviews with, one Nicole Martin, dated 11/1/94, a BLD employee for four months during the relevant time who was not called at trial (nor were her notes turned over by the way of Brady, though (as discovered after the 2255 was filed), Martin had told the Postal Inspector that; Charlie Regensburg was running the company; that she never approved or guaranteed anyone loans, just qualified them; that she had helped customers obtain loans; that she had never heard the name David Jaffe; and the only thing wrong she saw was if no $ refunded. Indeed, there was solid evidence that many BLD customers, including Steve Matteson, one of the first BLD customers, who according to the Postal Inspector's grand jury testimony had been defrauded, did receive loans. Though Mr. Hertzberg knew this by the time of trial he did not show this striking fact to the jury. The government tried to conceal Mr. Matteson by taking his name off the witness list and not including his questionnaire in the 3500 material. In this regard, Mr. Lato succeeded, the documents regarding Mr. Matteson were

never introduced into evidence, because after a "surprise" status conference in the middle of the trial, indicated by the judge. and supported by all three defense attorneys, that the defendants were not allowed to attend, Mr. Matteson's name was dropped from the indictment without any discussion from the defendants. It should be noted that Judge Seybert in her Memorandum and Order concerning Jaffe's 2255 "mistakenly" says they were brought into evidence.

In addition, new counsel discovered in the government's files other documents that contradicted numerous theories that the government had argued to the jury in summation based on testimony of its cooperators. Not only did this withheld material further put Regensburg, as well as the "Regensburg-Davis" "team", in a new light. It also put Inspector Lafleur in a different light. Indeed it would have gone far to further impeach LaFleur, who testified at trial.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted to Enforce The Notion That Due Process, Requiring That All Exculpatory Material Known To The Government, In Favor Of The Defense, Should Be Handed Over To The Defense, As Required By Brady. The Government Should Not Be Able To Hide Behind The 2d Circuit's Zagari Decision Essentially Blaming The Defense Counsel In Not Doing Due Diligence.

The prosecution has an affirmative duty to disclose evidence favorable to a defendant. Where that evidence is material, the failure to disclose it violates due process, irrespective of the good or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963)

Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different. United States v. Bagley, 473 U.S. 667, 682 (1985). Importantly, as explained by the Supreme Court in Kyles v. Whitley, 115 S.Ct.1555, 1566-7 (1995), a showing of materiality does not require demonstration by the preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonably probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Id., 1566 (citations omitted).

Nor is materiality a sufficiency test. The suppressed exculpatory evidence does not have to discount a certain amount of inculpatory evidence and thereby render the remaining evidence insufficient. Rather, one shows a Brady violation by showing "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. And, in making this determination, the suppressed evidence should be considered collectively, not item-by-item, as Judge Seybert plainly did in her decision; it must look at the case as a whole and ask whether "competent counsel" could have used the evidence in such a way as to make a different result reasonably probable.

In this case the suppressed evidence included not only notes of the interview with Nicole Martin (the BLD employee who told the Postal Inspector that Charlie Regensburg was running the company; that she never approved or guaranteed anyone loans, just qualified them; that she had helped customers obtain loans; that she had never heard the name David Jaffe; and the only thing wrong she saw was if no $ refunded), but also other documents that contradicted a number of the theories that the government had expressly argued to the jury about the management and

operation of the companies which, it contended, could be relied on to find Mr. Jaffe's knowledge of and intent to participate in the scheme. What is remarkable is how many of the government theories Nicole Martin's interview notes rebut. Competent counsel could have used this evidence, collectively, and as discussed at length in the 2255 Petition and Reply Declaration, to fuel an effective cross-examination of the government's cooperating witnesses and of Inspector LaFleur himself, destroying confidence in their story and in LaFleur's ability to have been fair in debriefing and preparing the cooperators in the first place. As in Kyles v. Whitley, the suppression here raises " a substantial implication" that these witnesses had been coached to give the same party line by Inspector LaFleur and after him, the prosecutor.

Indeed, the fact that the undisclosed evidence directly refuted so much of what the prosecutor argued in summation shows the significance of the suppressed evidence for the prosecution. The fact that it shows Postal Inspector LaFleur's prior knowledge of certain material facts that were testified in front of the Grand Jury to obtain the indictment, there is a strong presumption that the documents were purposely not disclosed to cover-up his perjury, and thus prejudice. This is discussed with more detail in the 2255 Petition and Reply Declaration. Judge Seybert, however, ignored the implications, seemingly intent on upholding the conviction no matter what!

The judge's ruling on the Brady claim, when itself dissected, is, indeed, shown flawed in the same way as her ruling on the ineffective assistance of counsel claim. She concluded, in essence, that though the undisclosed evidence may have been exculpatory, it was not material and therefore need not have been disclosed, because it either was not necessarily inconsistent with the government's evidence or was cumulative of certain minor concessions the defendant was able to elicit from the government's witnesses in cross-examination.

Again, Judge Seybert did not analyze how the jury's assessment of the defense would have been impacted had it been presented with more than counsel's arguments about witnesses' creditability. Competent counsel would not have relied on argument alone. Had the jury been presented with substantial independent evidence that supported competent counsel's arguments, there is at least a reasonable probability that the outcome would have been different.

The government has also argued in response to motions in this matter and to the government's brief in the co-defendants' appeal that there was no Brady violation because, it says, it maintained an "open file policy" by which all the documents in its possession were available to the defense. (In the Govt.'s Memo in Opposition to Motions for Certificate of Appealability and For release Pending Appeal, dated 4/15/98, at 8-9; Govt. Brief, 97-1151(L), at 27-30) This belated attempt to justify itself for its blatant Brady violation is at odds with principle and in any event wholly unsupported by the record.

As set forth in Jaffe's Reply Petition, the missing documents were discovered in the office of Postal Inspector LaFleur while LaFleur was on vacation (and thus someone else was there to give access to the files). AUSA Lato, the assistant who has made the "open file" argument to the 2d Circuit and who had represented the government at trial, did not make this argument in the District Court, when the exact "openness" of the government's files might have been explored. Nor, did LaFleur make any such presentation.

In any event, according to AUSA Lato, he himself has no way of knowing whether the undisclosed files were or would have been made "available" to the defendant during the trial since he himself did not even bother to review files to determine whether documents should be turned over or whether there was Brady material. According to Mr. Lato, he had delegated to Inspector LaFleur the job of determining which documents to disclose to the defendant. (Discussed in Mr. Jaffe's 2255 Reply Declaration, referring to a portion of

the trial transcript wherein AUSA Lato reported that it had been Mr. LaFleur who had prepared copies of materials that "in his opinion" ought to be given to the defendants and that he (Lato) had not seen the documents. (T. 932-933) The Eastern District has no known "policy" for opening all its files to defense rummaging, the defense was actively misled by the government when Mr. Lato advised the defense that there was no exculpatory material.

In Judge Seybert's decision, regarding Jaffe's 2255 Petition and Reply Declaration's Brady claim (Memorandum and Order, dated March 13, 1998, page 42-43) she lists some of Jaffe's assertions then says:

"The Court has reviewed all of these documents and concludes that no Brady violation has occurred. In support of petitioner's argument, defense (appellate) counsel points to the Second Circuit's recent decision in United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997). In that case, the Second Circuit described the three types of situations where violations of Brady v. Maryland occur:(1) where undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew or should have known of the perjury; (2) where the government fails to provide evidence that was specifically requested by the defense; and (3) when the defense makes either no discovery request or only a general request for "Brady" material and exculpatory material is withheld. Id.at 392.

In Jaffe's 2255 Petition and Reply Declaration, as well some examples within this writ, Jaffe shows an abundance of evidence proving the government themselves committed perjury, within Postal Inspector LaFleur's Grand Jury testimony, which the government support their perjury with the suborning of perjury from the cooperating witnesses before and during trial. Neither, Judge Seybert, in her decision of Jaffe's 2255 (Memo. and Order, dated 3/13/98) nor the 2d Circuit, in their Summary Order (dated 7/7/98) or in their response to Jaffe's motion for a Certificate of

Appealabilty (dated 11/10/99) account for or mention these irrefutable and documented allegations.

The 2d Circuit's decision (Summary Order, App. Page 6), regarding the Brady claim, mirror's the argument of the government and the District Court. First, the 2d Circuit repeats, verbatim, the government's argument (Brief and Appendix for the United States, 97-1171(L), dated 1/2/98, page 28):

"Thus, Brady cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and defense counsel should know of them and fails to obtain them because of lack of due diligence in his own investigation." United States v. Zagari, 111 F.3d at 320 (quoting United States v. Payne, 63 F.3d at 1208 (2d Cir. 1995). Here, the Government made all of the documents at the Postal Inspection Office available to the defendants."

In Zagari the 2d Circuit contradicts the U.S. Supreme Court's Brady decision. If given the probable view that the defendants would not know what the govt.'s internal investigation and document's would show, essentially, the 2d Circuit's decision allows the govt. to withhold or hide materials beneficial to the defense, if the govt., at anytime before, during or after trial, merely "says" the substantial exculpatory evidence was available, blindly taking the side of the govt.'s word, without discussion or argument from the defense and blames defense counsel for their lack of due diligence thus proving a defendant's claim of ineffective assistance of counsel. Such a bias assumption exonerates the govt. from Brady's obligation to disclose. Within this Writ, it is shown why this court should disbelieve the government's assertion of an "open file policy".

Because Brady material is essential to a defendant's constitutional right to a fair trial, when the government does not disclose extremely exculpatory material to the defense, and when those materials show repetitive and incontestable perjury and prejudicial testimony, the District Court's and 2d

Circuit's decisions' that "the appellant has not made a substantial showing of the denial of a constitutional right" is disingenuous and unreliable, especially in the 2d Circuit's explanation considering there assertion of "Upon due consideration". Considering, the determination of the 2d Circuit's denial of Jaffe's claims in their Summary Order, dated 7/7/98, when he was granted intervention during his co-defendant's appeal, and the error proven by Jaffe, and admitted by the 2d Circuit (granting the order vacating findings and conclusions as to intervenor Jaffe, 8/13/99, there is no indication that the 2d Circuit has even examined Mr. Jaffe's Petitions, if they have their decision is unsupported by the facts.

This Court should grant this writ, as well as, a Certificate of Appealability, and considering the unwillingness of the 2d Circuit to grant Mr. Jaffe an appeal and for reasons of justice, Mr. Jaffe asks the U.S. Supreme Court reverse the convictions or review this matter themselves, de novo.

II. This Court Should Grant This Writ To Reinforce The Notion That Comments And Opinions By The District Judge, Have Great Significance Which May Interfere With The Adversary Proceedings, Especially When Those Statements Reveal Prejudice And Bias Before, During and After The Trial, This Violates The Defendant's Right To Due Process And The Right To Be Presumed Innocent.

From the start, the District Judge, Joanna Seybert, essentially adopted the government's approach and viewpoint at just about every phase of this case, albeit she might not have known until the trial that the government had lied to the Grand Jury and suborned perjury from the pleading cooperators. As we have shown the government had basically "put words in the cooperators mouths". At cooperating codefendant Todd Davis' plea hearing (GX

3500-24, page 10-11, on May 23,1996) Judge Seybert did so as well.

> Mr. Davis: After the consumers called on the phone they were told that BLD would get them loans, took their application fees and did not provide them with the loan. I helped create the ads. I was generally aware of what BLD's employees were doing.
>
> The Court: When you say the employees, can you tell me who you had this agreement with?
>
> Mr. Davis: I –
>
> The Court: In other words, was it the people in the indictment?
>
> Mr. Davis: I am sorry?
>
> The Court: In other words, the other co-defendants.
>
> Mr. Davis: Yes.
>
> The Court: Is that who you were dealing with?
>
> Mr. Davis: Yes.

Judge Seybert did not let Mr. Davis answer on his own, this has extremely prejudicial implications, and it shows that Judge Seybert had already made up her mind on everyone's guilt. Mr. Davis had not made any such sweeping implications in his proffer. In fact, Mr. Davis who had given Mr. LaFleur a partial list of people who did receive loans from Primerica/Commercial Credit, prior to the indictment and not discovered until after the trial, and according to his proffer (dated 4/10/96, GX 3500-15) Mr. LaFleur wrote down "TD (Todd Davis) provided Regensberg (Charles) with a list of people who got loans." It is obvious to assume that Mr. Davis lied to Judge Seybert when he indicated no one got any loans, to wrongfully enforce the Government's perjury to the Grand Jury. The same basic scenario occurred in Regina Quinan's and Charles Regensburg's plea hearings, perjurously testifying no one got any loans, although they contradicted themselves in their previous statements to Mr. LaFleur at the time of their proffers.

Judge Seybert's decision in Jaffe's 2255 Petition shows equal prejudice, ruling in the end, Mr. Jaffe's

complaint about his trial attorney boiled down to mere "critiques of trial strategy supported by hindsight." (Memo and Order). She began her analysis by characterizing lawyers' decision as to the manner in which witnesses should be called on behalf of the defense, as "strategic in nature'; she then in effect found that counsel's failure to engage in a more thorough investigation or to use any of the 3500 material did not render his strategic decisions (whom to call and how to cross examine) "unreasonable, because anything counsel would have found or used as a result of these efforts was "consistent" with the overall "strategy" of calling witnesses "liars" and of arguing that Jaffe's "sole interest was in Allied, a legal and professional company." Relying principally on United States v. Nersesian, 824 F.2d 1294 (2d Cir. 1987), Judge Seybert reasoned that any time a challenge to counsel's performance involves the failure to do something that fails within the broad area of "strategy", counsel's deficiencies cannot be deemed "unreasonable" if counsel did do something (such as argue to the jury) to defend consistent with some strategy. Thus, despite the 47 pages she wrote, Judge Seybert engaged in no discussion whatsoever as to why it made any "reasonable" sense not to cross-examine witnesses in useful, meaningful ways or why it was reasonable not to present exculpatory documentary evidence or address the issue of how the unused material might have put meat on the bare bones of the defense (as Jaffe has shown in his 2255 Petition). As for the documents that contradicted various arguments the prosecutor made in summation, Judge Seybert concluded that because there was already some evidence in the record that contradicted the government's assertions, "no reasonable doubt would be created that other wise would not exist." (Id. at 46)

Judge Seybert (memo and order, page 8) states "As the Supreme Court noted in Lockhart v. Fretwell, 506 U.S. 364, 368 (1993), the touchstone of an ineffective counsel claim is to focus on the fundamental fairness of the adversary proceeding itself and the reliability of the

outcome." Considering Mr. Jaffe's trial attorney admitted to Judge Seybert he was unfamiliar with federal practice, out of the presence of Mr. Jaffe, and had done almost no discovery, Judge Seybert knew unequivocally prior to trial, confirmed at trial, and proven within Mr. Jaffe's 2255 Petition that Mr. Jaffe's trial counsel, Mr. Hertzberg, was highly incompetent.

In what maybe the most prejudice of Judge Seybert's beliefs is her totally unsupported accusation made at Mr. Jaffe's sentencing (3/21/97, transcript page 66) that a victim testified his wife had died because they didn't receive a loan from BLD, she says: "It is unfortunate that many of you in the audience today were not able to see some of the victims who came here and testified how they buried their wives and lost their finances because they were victims of this scheme." Not to belittle the victims' lose but the finances Judge Seybert refers to is about $150 and the testimony of the victim who she indicates wife died is Mr. Garland, although he makes no such statement. Mr. Garland, testified he needed the loan "for the medical expenses and our bills that had mounted. And that we were behind, and I had car trouble, and you know, the normal everyday things that happen to everybody when starting to get in debt, you know, credit card troubles." Mr. Garland also testified that he and his wife saw an ad that said guaranteed loans, when no such ad existed and named two BLD employees that also never existed. The fact is AUSA Lato, (in his rebuttal summation, T. 1313), made this enormously prejudicial and false implication, when talking about Mr. Garland's testimony, Mr. Lato said: "And as he testified his wife has died and perhaps he has had other things on his mind." And again reinforcing Judge Seybert's false assumption at Mr. Jaffe's sentencing (page 70) Mr. Lato says: "George Garland who testified at trial he needed a loan for medical expenses, didn't get it. His wife subsequently died." As shown through Mr. Garland's testimony, he wanted a $5000 loan for past due medical expenses and other bills, as well as the fact that it was Mrs. Garland whom filled out Postal Inspector LaFleur's

questionnaire, dated 9/14/94 (GX 3500-4), more than 10 months after contacting BLD. Mr. Garland's wife did not die because BLD hadn't gotten them a loan, as Mr. Lato dishonorably implies. If Judge Seybert thought this was the case, there is a strong presumption the jury could have thought this as well, which creates a substantial prejudice. As discussed prior (p. 14-15) the comments by Judge Seybert during trial regarding her promises of declaring a "mistrial" if prejudice was proven and her "guarantee" of a winning summation, completely altered trial counsels defense strategy and thus Mr. Jaffe's decision to testify.

This Court should grant this writ and reverse the conviction of Mr. Jaffe, because such prejudice exhibited by the District Court interfered with the adversarial proceedings, as well as Mr. Jaffe's constitutional right to be presumed innocent.

III. This Court Should Grant The Writ To Clarify The 2d Circuit's Billy-Eko Decision Which Requires An Appellant To Pursue A "2255" to Show Ineffective Assistance Of Counsel When There Are Matters Outside The Trial Record.

Mr. Jaffe had only limited "participation" in the appeal, and only under very unique circumstances, made necessary by the 2d Circuit's decision in United States v. Billy Eko, 8 F.3d 111 (2d Cir. 1993), which requires an appellant to pursue a 2255 to show ineffective assistance of counsel when (as here) there are matters outside of the trial record. In order to show a more complete representation of Mr. Jaffe's ineffective assistance of counsel claims, his appellate counsel, Ms. Vivian Shevitz, who has over 15 years of appellate experience in the 2d Circuit, withdrew Mr. Jaffe's notice of appeal in order to expand the record. Mr. Jaffe was then allowed to do discovery, and found extremely exculpatory material. There has been a double standard in this case, Mr. Jaffe's co-defendants whom had also filed a

notice of appeal, were given permission by the 2d Circuit to supplement their appeals with the documents that Jaffe had developed, although as stated by the 2d Circuit's Summary Order, Mr. Brucato's court appointed attorney "does not specify how that material could have been used."

The Federal Rules of Civil Procedure states "a just, speedy, and inexpensive determination of every action". (FRCP 1) Our Justice System's time is valuable and it should not waste time examining incomplete 2255 claims. A clarification regarding the 2d Circuit's Billy-Eko ruling is needed. This Court should grant this writ and grant a Certificate of Appealability, so Mr. Jaffe could show a complete illustration of his unjust conviction.

IV. This Court Should Grant This Writ, As Well As A New Trial Or A Certificate of Appealability. To Reinforce The Notion That The Truth Matters And What Standards Determine The Legitimacy Of A Claim Of Ineffective Assistance Of Counsel. Under The Requirements Set In The Supreme Court's Strickland v. Washington Decision. There Is a Confusion With The 2nd Circuit's United States v. Nersesian Decision Regarding What Is Considered Reasonable Trial Strategy

The standards for assessing a claim of ineffective assistance of counsel are familiar: to prevail, a petitioner must show that trial counsel's performance fell below "an objective standard of reasonableness" under 'prevailing professional norms," and that there is a "reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-96 (1984).

In Judge Seybert's ruling (Memo and Order) on Mr. Jaffe's 2255 Petition she concluded, again without any analysis, that, even if counsel" performance fell below an objective standard of reasonableness, this "had little if any

impact on the outcome". This conclusion appears to be based on nothing more than that: "the information that Jaffe now seeks to bring out was on most occasions addressed by his counsel before the jury." Had counsel's arguments to the jury been supported by evidence, instead of by the emotion of counsel, there is a strong probability that the outcome would have been different. To be sure, there was strong evidence that victims were defrauded, but the case that defendant Jaffe was responsible depended principally on testimony of the cooperators whose credibility would have been severely undermined if they had been confronted with their prior inconsistent statements and if seized documents, the government's own findings and available witnesses contradicted it. See Napue v. Illinois, 360 U.S. 264, 269 (1959) ("the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"); United States v. Bagley, 473 U.S. 662, 677 (1985) (same). Judge Seybert's finding of no prejudice from that aspect of counsel's ineffectiveness is especially incomprehensible given the fact that AUSA Lato capitalized on defense counsel's failure to even allude to inconsistencies, mush less cross-examine witness about them. Thus, AUSA Lato ended his rebuttal summation with the observation that there was no evidence, he then corrected himself and said (T. 1310):

I should say none of the lawyers pointed out in any of their summations the key thing in this case, the contradiction.

Mr. Lato was quite right: neither Mr. Jaffe's lawyer nor the other two lawyers for the co-defendants, pointed out the contradictions! Given the wealth of contradictions, even this one dereliction alone resulted in Mr. Jaffe's trial being a nightmare for the notions of justice. The AUSA Lato also committed prosecutorial misconduct when he vouched for the truthfulness of witnesses, when he repeatedly went over the cooperation agreement with each cooperating witness and then numerous times in summation saying (T. 1215): "If they lie they don't get a letter with respect to their sentence"

and "All they are required to do is to tell the truth. If they don't tell the truth the deal is off." Although, Mr. Jaffe's trial counsel rebutted this by "saying" the cooperators were lying he didn't use anything to support it. The impression given to the jury from this was that the government possessed extra-record knowledge and the capacity to monitor the truthfulness of the testimony given by all the witnesses who had received or hoped to receive a 5K1 letter for their sentencing. This was severely prejudicial to the jury on who they would believe.

This Court should grant this writ, reverse the conviction of Mr. Jaffe and grant a new trial.

CONCLUSION

The government's case to the Grand Jury, to the District Judge, to the Jury and to the 2d Circuit contradicts their own findings. This court should make it clear that in our Justice System the truth matters. This Court should grant certiorari, reverse the unjust conviction of Mr. Jaffe and grant a new trial. At the very least, this court should grant Mr. Jaffe a Certificate of Appealability, and considering the unwillingness of the 2d Circuit to grant Mr. Jaffe an appeal and for reasons of justice, Mr. Jaffe asks the U.S. Supreme Court to review this matter themselves, de novo. Mr. Jaffe also seeks an independent investigation in to the denial and his constitutional and civil rights.

January 2000

Respectfully submitted,

DAVID JAFFE
1747 Karen Court
East Meadow, N.Y. 11554
(516) 292-8911

Petitioner – Pro Se

APPENDIX

E.D.N.Y.
97-CV-3007
Seybert, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court Of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the tenth day of November one thousand nine hundred and ninety-nine,

Present:

Hon. Ralph K. Winter,
Chief Judge
Hon. Richard J. Cardamone,
Hon. Chester J. Straub,
Circuit Judges

DAVID JAFFE, PETITIONER-APPELLANT,

v. 98-2295

UNITED STATES, RESPONDENT-APPELLEE.

Appellant has filed, through his attorney, a motion for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 USC 2253(c). The motions for consolidation and bail pending appeal are denied as moot.

FOR THE COURT:
Karen Greve Milton, Acting Clerk
By Lucille Carr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse. Foley Square, in the City of New York, on the 7th day of July, one thousand nine hundred and ninety-eight.

PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
Circuit Judges,
HON. J. GARVAN MURTHA,
District Judge.

----------X

UNITED STATES OF AMERICA,
Appellee,

-v.-

97-1171(L)
97-1410

TODD DAVIS; CHARLES R. REGENSBURG,
also known as Kevin Singleton and
REGINA QUINAN, also known as Ashley
Cole, also known as Megan Hill,

Defendants,

LUIS LAINO, also known as Bill Dukes,
also known as John Madison, and
ANTHONY BRUCATO,

Defendants-Appellants.

DAVID JAFFE,

Defendant-Intervenor.

----------X

_APPEARING FOR APPELLANTS:
A. KATHLEEN TOMLINSON, Uniondale, NY
(Farrell, Fritz Caemmerer, Cleary, Barnosky & Armentano,
PC, of counsel), for Defendant-Appellant Brucato.

(Paul P. Rinaldo, Forest Hills, NY)
for Defendant-Appellant Laino.

APPEARING FOR INTERVENOR:
(Vivian Shevitz, Katonah, NY).

APPEARING FOR APPELLEE: LEONARD LATO,
Assistant United States Attorney, Brooklyn, NY
(Zachary W. Carter, United States Attorney for the Eastern
District of New York, Emily Berger,
Assistant United States Attorney, of counsel).

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York (Seybert, J.) and was argued in part, and submitted in part.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is affirmed.

Defendants Anthony Brucato and Luis Laino appeal judgments of conviction entered against them in the United States District Court for the Eastern District of New York (Seybert, J.) stemming from their participation in a fraudulent telemarketing scheme.
Defendant David Jaffe was granted permission to intervene in this appeal. For the reasons stated below, we affirm.

Background. The nationally advertised telemarketing scheme offered personal loans regardless of credit history. A "broker" would take a loan application over the phone, and call back soon after to congratulate the customer on receiving loan approval and to request a "refundable" processing fee. This was a scam; most "loans" were never approved or provided, and few application fees were ever refunded.

The scheme was originally conducted through a company named BLD Finance ("BLD"), which ceased operations after receiving customer complaints, and continued under the new name International Credit Services ("International Credit"). The brokers employed by these entities used fictitious names in dealing with customers.

The participants in the scheme were indicted in February

1996. Several pled guilty, and cooperated; Jaffe, Brucato, and Laino went to trial. The jury convicted Jaffe and Brucato of conspiracy to commit wire fraud, 18 U.S.C. _ 371, six counts of substantive wire fraud, 18 U.S.C. _ 1343, and one count of conspiracy to launder monetary instruments, 18 U.S.C. _ 1956(h); Jaffe was also convicted of three counts of substantive money laundering, 18 U.S.C. _ 1956(a). Laino was convicted of three counts of substantive wire fraud, but was acquitted of one count of conspiracy to commit wire fraud, one count of conspiracy to launder money, and three counts of substantive money laundering.

Alleged Brady Violations. Brucato argues that the Government violated its obligation under Brady v. Maryland, 373 U.S. 83 (1963), by failing to produce certain documents that were located at the Postal Inspector's Office: (1) notes indicating that a $25,000 loan was actually approved for one of BLD's alleged victims; and (2) a handwritten list showing that refunds had actually been paid to several BLD clients. Brucato argues that these documents contradicted the Government's assertion that no loans were ever approved or refunds given, and would have been useful for impeachment purposes.

Similarly, Jaffe argues that the Government breached its Brady duty by failing to turn over a Postal Inspector's notes of an interview with a BLD employee who stated that she had never heard of David Jaffe, and that she helped BLD customers receive loans and believed they received refunds. Jaffe also asserts generally that the Government failed to turn over "other documents that contradicted a number of the theories that the Government [ ] expressly argued to the jury." Jaffe also argues that competent counsel could have used this material to cross-examine the Government's cooperating witnesses and the Postal Inspector. We conclude that the Government did not breach its Brady duty.

First, "Brady cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation." United States v. Zagari, 111 F.3d 307, 320 (2d Cir. 1997) (citations and quotation marks omitted). Here, the Government made all of the documents at the Postal Inspection Office available to the defendants; Jaffe made two visits to the facility, and Brucato declined the opportunity.

Second, the allegedly undisclosed evidence was not material because it would have been cumulative. At trial, a defense witness testified that twenty of BLD's customers were ultimately approved for loans by another lender to which BLD had forwarded some loan applications. Another witness testified that between one and ten BLD customers did receive processing fee refunds. And none of this evidence contradicts the testimony of victims who testified that they personally did not receive any loans or refunds. It is not probable that this evidence, if presented at trial, would have affected the verdict. See id. at 319-320, quoting United States v. Bagley, 473 U.S. 667, 682 (1985).

Effective Assistance of Counsel. Brucato's counsel did not perform "outside the wide range of professionally competent assistance." Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)). Contrary to Brucato's assertions, his counsel did make a Brady application during the trial. Although the application was ultimately withdrawn, it was not "improper" as Brucato suggests. Brucato's assertion that his counsel "lacked basic knowledge of federal criminal law" is also not demonstrated. Brucato also argues that his counsel failed to conduct thorough discovery, but Brucato does not point to anything his counsel could have discovered that would have

changed the outcome of the trial. Brucato argues that his counsel failed to make use of 3500 material, but Brucato does not specify how that material could have been used. Finally, Brucato argues that his counsel failed to cross-examine Postal Agent LaFleur, but Brucato gives us no reason to conclude that an effective cross-examination would have changed the outcome of the trial.

Jaffe's ineffective assistance claim rests on general assertions that his counsel failed (a) to use "available documents" to support his arguments to the jury, (b) to "make use of one bit of 3500 material" to impeach witnesses; and (c) to conduct discovery or find "other material to support his client's defense." But Jaffe does not identify particular documents or materials, or indicate how they could have been used at trial.

Brucato's Money Laundering Conviction. Brucato argues that the evidence at trial was insufficient to show that he participated in a money laundering conspiracy. Brucato is mistaken. The evidence at trial showed that Brucato, Jaffe, and Charles Regensburg (another participant in the scheme) regularly acted in concert to collect the proceeds of the unlawful telemarketing operation, deposit them in a financial institution, and then disburse the funds to employees of the operation as payroll to promote the carrying on of the fraud. These facts establish the requisite elements of a conspiracy to commit money laundering. See 18 U.S.C. _ 1956(a)(1), (h). Although there is no direct evidence of an explicit agreement to launder money, the jury could infer the existence of a tacit understanding to that effect from the concerted action of Brucato, Regensburg, and Jaffe. See United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997) (A "conspiratorial agreement itself may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement.").

Laino's Wire Fraud Convictions. Luis Laino argues that, as a BLD broker, he merely "read from the script which was provided to him," and that the Government failed to produce evidence that he knowingly made false statements or representations over the telephone. Laino also argues that his acquittal for conspiracy to commit wire fraud suggests that the jury found insufficient proof that he knew that he was involved in an illegal operation.

The essential elements of wire fraud are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the wires to further the scheme. United States v. Zagari, 111 F.3d 307, 327 (2d Cir. 1997). In addition, "to establish the existence of a scheme to defraud, the government must present proof that the defendant[] possessed a fraudulent intent ... that the defendant contemplated some actual harm or injury." Id. (citation and quotation marks omitted).

Each of Laino's wire fraud convictions was supported at trial by the testimony of a victim and a coconspirator. The victims testified to essentially the same series of events: (a) calling either BLD or International Credit and speaking to "Bill Dukes" or "John Madison" (aliases used by Laino); (b) being called back by the same person and being told that a loan had been "approved"; and (c) sending in the requested "processing fee" in order to receive the loan. None of the witnesses ever received a loan. In addition, Charles Regensburg testified that he hired Laino, that he and Brucato trained Laino how to be a broker, that the training included "the pitch," and that the pitch involved calling customers back and congratulating them on being approved for a loan, when in fact the pitch was a lie—and no loans had been approved.

This evidence was sufficient to support the jury's inference that Laino knowingly participated in a scheme to

defraud "customers" of BLD and International Credit. The jury could infer that Laino, after having been trained by Regensburg and Brucato, knew that "the pitch" was false, and that Laino then used the pitch to defraud these witnesses of their "processing fees." Moreover, Laino's acquittal on the conspiracy count does not preclude his conviction on the substantive counts; the elements of the two crimes are different, and the jury could have found that the Government proved the elements of one crime, but failed to prove the elements of the other. United States v. Giuliano, 348 F.2d 217, 220-21 (2d Cir. 1965) (acquittal on conspiracy count not necessarily inconsistent with conviction on substantive count because the elements of the two crimes were different).

The Jury Instructions. The district court instructed the jury that use of false names by Brucato or Laino could imply consciousness of guilt. The court explained that it found this charge to be appropriate because Brucato and Laino changed aliases when BLD became International Credit--a change that suggested an intention to avoid being located by unhappy BLD customers.

Brucato and Laino argue that this charge was error because: (1) the use of fictitious names is common practice in telemarketing, so common that the FTC instituted record-keeping requirements regarding fictitious names for telemarketing agents; (2) an innocent explanation for the use of fictitious names was to make the names shorter and easier to remember; and (3) the charge itself was not "balanced" because the district court did not suggest "legitimate reasons" for using false names.

This Court reviews a claim of error in the jury instructions de novo. Anderson v. Branen, 17 F.3d 552, 556 (2d Cir. 1994). A consciousness-of-guilt instruction based upon the use of false names is permissible if there is record

evidence "on the basis of which the jury could make such a finding." United States v. Stevens, 83 F.3d 60, 67 (2d Cir. 1996) (per curiam).

We agree with the district court that the change of names can support the inference that the new names were used by Brucato and Laino to avoid being located at International Credit by defrauded BLD customers. The fact (as may be) that use of false names is common in telemarketing, and that the FTC regulates the use of such names, does not explain why Brucato and Laino changed aliases when BLD became International Credit. The district court was not required to instruct the jury that there may be legitimate reasons for using false names; the jury heard evidence suggesting an innocent explanation for the use of the false names, evidence that the jury did not credit.

The judgment of the district court is affirmed.